Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Access Charge Reform	)	CC Docket No. 96-262
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers	)	CCB/CPD File No. 98-63
BellSouth Telecommunications, Inc.'s Petition for Pricing Flexibility for Special Access and Dedicated Transport	)	CCB/CPD File No. 00-20
BellSouth Telecommunications, Inc.'s Petition for Pricing Flexibility for Switched Access	)	CCB/CPD File No. 00-21

REPLY OF AT&T CORP. AND WORLDCOM, INC. IN SUPPORT OF THEIR MOTION FOR A MORATORIUM ON PRICING FLEXIBILITY PETITIONS PENDING JUDICIAL REVIEW

AT&T Corp. ("AT&T") and WorldCom, Inc. ("WorldCom") respectfully submit this reply in support of their motion for a moratorium on all petitions under the Commission's *Pricing Flexibility Order*[1] pending judicial review of that *Order*.[2] As demonstrated in that motion, and in the Competitive Telecommunications Association ("CompTel") and Association

[1] *Access Charge Reform, et al.*, CC Docket Nos. 96-262, 94-1, 98-157 and CCB/CPD File No. 98-63, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14222 (1999) ("*Pricing Flexibility Order*" or "*Order*").

[2] *MCI WorldCom, Inc. et al.* v. *FCC*, Nos. 99-1395, 99-1404, and 99-1472 (D.C. Cir.) (oral argument scheduled for November 30, 2000).

for Local Telecommunications Services ("ALTS") comments in support of the motion,[3] a moratorium on all pricing flexibility petitions is in the public interest, because it could spare both the Commission and the parties the enormous cost of various kinds of litigation both during the pendency of the appeals of the *Pricing Flexibility Order* and in the event that the D.C. Circuit vacates the *Order*.

In their separate Oppositions,[4] BellSouth, Qwest, SBC, and Verizon (the "ILECs") and United States Telecom Association ("USTA") have offered no reason to deny the moratorium. Indeed, the vast bulk of their Oppositions are simply irrelevant. AT&T and WorldCom are seeking a moratorium under the legal standards that govern the grant of a moratorium, which focus on an agency's management of its own resources in carrying out its statutory duties. The request for a moratorium must be judged against those standards. *See, e.g., Western Coal Traffic League* v. *Surface Transp. Bd.*, 216 F.3d 1168, 1175 (D.C. Cir. 2000).

To be sure, AT&T and WorldCom believe they can satisfy the quite different legal standards for a stay pending judicial review, which include the likelihood of success on the merits and irreparable injury to the parties. If the Commission were to deny this request for a moratorium, AT&T and WorldCom are prepared to file a full-blown motion for a stay with this Commission and, if necessary, with the Court of Appeals. Such a request would, of course, include affidavits and other evidence that has not yet been presented to the Commission, and

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[3] *Comments in Support of a Moratorium on Pricing Flexibility Petitions Pending Judicial Review*, CC Docket No. 96-262 *et al.* (filed Sept. 15, 2000).

[4] *Opposition of BellSouth, Qwest, SBC, and Verizon to Motion of AT&T and WorldCom for a Moratorium on Pricing Flexibility Petitions Pending Judicial Review*, CC Docket No. 96-262 *et al.* (filed Sept. 15, 2000) ("ILEC Opp."); *Opposition of the United States Telecom Association to Motion of AT&T and WorldCom for a Moratorium on Pricing Flexibility Petitions Pending Judicial Review*, CC Docket No. 96-262 *et al.* (filed Sept. 18, 2000) ("USTA Opp.").

which would address each of the factors governing consideration of a stay. Among other things, those materials would show in detail that AT&T and WorldCom are likely to succeed on the merits, and that the prospect of anticompetitive conduct and extreme disruption caused by the need to make and re-make contracts in response to the D.C. Circuit's likely ruling would cause AT&T and WorldCom irreparable harm.

But regardless of the standards for a stay, the potential cost of processing and then undoing nationwide pricing flexibility is so enormous that the Commission should simply enter a brief moratorium on all pricing flexibility petitions. This will avoid the possibility that substantial Commission resources will be diverted from more important matters to the extensive litigation that would be necessary to restore the Commission's price cap and rate structure rules if the Court does vacate the *Pricing Flexibility Order*.

Tellingly, neither the ILECs nor USTA disputes any of the premises of AT&T's and WorldCom's motion. They do not dispute that all of the major LECs are about to seek effectively nationwide pricing flexibility relief that would encompass virtually all major and even mid-sized and smaller MSAs throughout the country.[5] Indeed, the very fact that all of the major LECs and USTA have opposed AT&T's and WorldCom's request for a brief moratorium simply confirms that nationwide relief may be imminent.

Nor do they dispute that such relief would remove virtually all regulatory constraints on services over which the Commission *concedes* these LECs have market power.

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[5] As AT&T and WorldCom previously noted (*see* Motion at 4), BellSouth's pending petitions are astonishingly broad. With respect to special access, BellSouth seeks relief in MSAs encompassing all nine states in its region. BellSouth seeks Phase II relief for special access and dedicated transport in 38 MSAs, and Phase II relief for channel terminations in 26 MSAs. With respect to switched access, BellSouth claims to have satisfied the triggers for Phase I relief in 10 MSAs, including Atlanta, Miami, Orlando, and Jacksonville. And the ILECs have previously

Pursuant to such relief, the vast majority of special access services throughout the country would no longer be subject to price caps (which guard against supracompetitive rates) or restrictions on geographic rate deaveraging (which guard against targeted exclusionary and predatory pricing). Thus, they do not dispute – and, indeed, the Commission has conceded – that such relief would allow the LECs to *raise* their special access rates throughout the relevant MSAs while offering targeted, predatory rates through contract tariffs or other targeted deaveraging in specific areas within an MSA where they face the threat of competitive entry. *See Pricing Flexibility Order* ¶¶ 83, 142; *Petition of U S WEST Communications, Inc. For Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Memorandum Opinion and Order, 14 FCC Rcd. 19947, ¶ 34 (1999) ("*Forbearance Order*").[6] Such relief would also permit targeted, exclusionary pricing for *switched* access services on an almost nationwide basis through contract tariffs. The breadth and scale of such relief is unprecedented; nationwide deregulation of services over which the LECs concededly have market power is not "modest" under any definition of the word. *Cf.* ILEC Opp. at 3.

The ILECs' and USTA's only response is to note that competitors are still permitted to file complaints under Section 208 to combat such anticompetitive pricing practices. *See* ILEC Opp. at 3. But that simply confirms the need for a brief moratorium. Removing all rate regulation from services over which the LECs are conceded to have market power invites all manner of anticompetitive pricing, and nationwide deregulation could easily result in scores of

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contended they will immediately qualify for Phase I relief in 45 of the top 50 markets, and Phase II relief in 35 of the top 50 markets.

[6] Neither the FCC nor the ILECs, either in their appellate briefs or in the oppositions to the moratorium request, have ever answered the point that, under the Commission's own theory as expressed in ¶ 79 of the *Pricing Flexibility Order*, Phase I relief would permit the ILECs to engage in exclusionary and predatory pricing on any route in the MSA where sunk facilities do not already exist – which, of course, would be the vast majority of the routes in the MSA.

Section 208 complaints during the pendency of judicial review. Substantial litigation under Section 208 would divert scarce Commission resources from other proceedings. Thus, the prudent course is to wait to see if the Court upholds the *Pricing Flexibility Order* before replacing the price cap system's prophylactic curbs on the LECs' market power with the far more burdensome system of rate-regulation-by-complaint proceedings.

Similarly, the ILECs and USTA do not dispute that nationwide pricing flexibility relief would quickly result in hundreds if not thousands of contract tariffs during the pendency of judicial review. As AT&T and WorldCom pointed out (*see* Motion at 7), since contract tariffs are permitted under Phase I, pricing flexibility relief could result in literally thousands of contract tariffs covering *all* interstate access services in *all* of the MSAs throughout the nation in which any LEC seeks relief. As a result, the ILECs and USTA do not seriously dispute that, if the Court of Appeals does vacate the *Pricing Flexibility Order*, the task of reimposing price cap and rate structure regulation will be enormous (if not impossible). Not only will the Commission have to conduct a burdensome proceeding to reimpose price cap regulation, to provide appropriate refunds, and to undo innumerable individual contract tariff arrangements, but there would undoubtedly be untold litigation over the damages arising out of the thousands of individual (and unlawful) contract tariffs entered into during the pendency of judicial review. Such proceedings would consume an enormous amount of Commission resources.

In view of these facts, which are not in any serious dispute, a moratorium is manifestly in the public interest. The ILECs' protestations notwithstanding, there is no question that the Commission always has inherent authority to manage its docket and to order its priorities in such a way as to ensure that undue resources are not diverted from other proceedings necessary to carry out its statutory mandate. As the D.C. Circuit has held repeatedly, in the

exercise of its delegated authority, an "agency is in a unique – and authoritative – position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way." *See Western Coal*, 216 F.3d at 1175 (*quoting In re Barr Laboratories, Inc.*, 980 F.2d 72, 76 (D.C. Cir. 1991)). Thus, the D.C. Circuit has upheld FCC freezes on processing applications where the FCC reasonably determined that the "effort invested" in individual applications or petitions "might be rendered futile" by future developments. *Kessler* v. *FCC*, 326 F.2d 673, 682, (D.C. Cir. 1963); *Harvey Radio Labs.* v. *United States*, 289 F.2d 458, 460 (D.C. Cir. 1961). As these cases make clear, the relevant consideration is the agency's inherent authority to manage its resources and the protection of its ability to carry out its larger mandate – not the *source* of the potential changes that might render the expenditure of agency resources futile or unnecessary. Thus, the fact that here a court order, rather than an agency order, might result in a needless expenditure of substantial Commission resources does not (and could not) affect the agency's inherent power to manage its docket. *See, e.g., Westinghouse Electric Corp.* v. *NRC*, 598 F.2d 759 (3d Cir. 1979) (NRC instituted a moratorium on certain licensing proceedings while the *President* conducted a multinational review of alternative fuels that would pose a lesser risk of international proliferation of nuclear weapons).

In sum, if the Commission grants almost nationwide pricing flexibility for switched and special access services, and the D.C. Circuit then vacates the *Pricing Flexibility Order*, the resulting proceedings to reestablish price cap regulation and to sort out the numerous claims arising out of thousands of contract tariff situations would pose an unusually enormous burden on the Commission and its available resources. The Commission need not run that risk. The brief moratorium requested here would avoid the need for any such proceedings. Moreover, as AT&T and WorldCom showed (and as the ILECs and USTA do not dispute), the moratorium

would last only a matter of months. Indeed, the ILECs waited a year to file their first pricing flexibility petitions even though they have consistently claimed they could have satisfied the triggers immediately (*see* ILEC Opp. at 8). Having strategically waited to file their petitions, the ILECs are in no position to protest a brief, additional delay in that relief (if such relief is indeed both lawful and warranted). The Commission should therefore institute a brief moratorium on all pricing flexibility petitions until at least 60 days after the Court of Appeals rules on the petitions for review of the *Pricing Flexibility Order*.[7]

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[7] Indeed, the Commission should consider a moratorium on all pricing flexibility petitions until new entrants have the unrestricted ability to offer special access via combinations of unbundled loops and transport. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order Clarification (rel. June 2, 2000) (restricting ability of new entrants to combine unbundled loop and transport to provide special access services). As the Commission has acknowledged in the *UNE Remand Order*, new entrants would be unable in most cases to respond to ILEC pricing flexibility with facilities-based offerings, and therefore it would be wholly inappropriate to grant such pricing flexibility at a time when new entrants would also be unable to respond with UNE-based offerings. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order, 15 FCC Rcd. 3696 (¶¶ 182-87, 355-56, 359) (1999).

CONCLUSION

For the foregoing reasons, and those set forth in AT&T's and WorldCom's motion and the supporting comments, the Commission should declare a moratorium on petitions under the *Order* until sixty days after the D.C. Circuit's final decision on judicial review of that *Order*.

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CERTIFICATE OF SERVICE

I, James P. Young, do hereby certify that on this, the 22nd day of September, 2000, copies of the foregoing "Reply of AT&T Corp. and WorldCom, Inc. in Support of Their Motion for a Moratorium on Pricing Flexibility Petitions Pending Judicial Review" was served by facsimile and U.S. first class mail, postage prepaid, on the parties named below.

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